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September 2, 2008

**DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 11, 2008

Case Number: TSO-0622

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization¹ (or "security clearance") under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should be granted.

I. Background

The individual is an applicant for a DOE security clearance. On April 11, 2007, the individual completed and signed a Questionnaire for National Security Positions (QNSP) in which he revealed that he had used cocaine while active in the military in 2003. Ex. 7. Based on concerns arising from the individual's QNSP, the DOE Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the Individual.² At the PSI, the individual clarified that he "tasted" cocaine on one occasion in 2003. Ex. 7 at 19. During the same PSI, the individual also admitted to using marijuana approximately ten times while in high school in 1997 and 1998. Ex. 8 at 15.

Based on the individual's account of his previous drug use, the LSO determined that the individual had used marijuana and cocaine. Through further questioning at the PSI, the LSO concluded that the individual used cocaine while in possession of a Department of Defense (DOD) security clearance. Further, the individual admitted that he used cocaine despite knowing that his illegal drug use was in violation of the military's zero tolerance policy regarding illegal drugs.

On March 18, 2008, the LSO issued a letter (Notification Letter) advising the individual that it possessed reliable information that created a substantial doubt regarding his eligibility to hold a

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a).

² The transcript of the October 10, 2007, PSI appears in the record as Exhibit 8.

security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (k) and (l) (hereinafter referred to as Criteria K and L, respectively).³

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. On May 27, 2008, the Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in this case. I subsequently convened a hearing within the time prescribed in the regulations. At the hearing, three witnesses testified. The DOE Personnel Security Specialist testified on behalf of the agency. The individual testified on his own behalf and also called his wife as a witness. In addition to the testimonial evidence, the DOE submitted nine exhibits into the record; the individual submitted four. The transcript taken at the hearing shall be hereinafter cited as “Tr.” Various documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as “Ex.” Documents submitted by the individual shall be cited as “Ind. Ex.”

II. The Notification Letter and the Security Concern at Issue

As previously noted, the LSO cites two criteria, Criteria K and L, as bases for denying the individual’s application for a security clearance. With regard to Criterion K, the LSO relies on the individual’s admission during the PSI that he used marijuana while in high school in 1997 and 1998, and cocaine in May 2003 while in possession of a DOD security clearance. As for Criterion L, the LSO cites several facts, among which are the following: (1) during his October 2007 PSI, the individual admitted using marijuana ten times in 1997 and 1998; (2) the individual admitted using cocaine in May 2003 while possessing a DOD security clearance; and (3) although the individual stopped using marijuana in 1998 because he did not want his use to negatively impact his future military career, he used cocaine in May 2003 despite his knowledge that cocaine use was in violation of the military’s zero tolerance policy.

I find that the information set forth above constitutes derogatory information that raises concerns about the individual’s illegal drug use under Criteria K and L. The LSO invoked Criterion K because of the individual’s admitted past illegal drug use; specifically smoking marijuana while in high school and using cocaine while in the military. The use of an illegal drug is a security concern both because it may impair a person’s judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules and regulations. *See* Guideline H of the *Revised*

³ Criterion K relates to information that a person has “[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8(k). Criterion L relates to information that a person “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances includes, but is not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.” 10 C.F.R. § 710.8(l).

Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (*Revised Adjudicative Guidelines*).

With regard to Criterion L, the individual's one-time use of an illegal substance in violation of the military's zero tolerance policy and while holding a DOD security clearance is problematic from a security standpoint because it calls into question his willingness to comply with the law as well as his honesty, reliability and trustworthiness. *See id.*, Guideline E.

III. Findings of Fact

The individual's admissions to the concerns in the Notification Letter are incorporated herein. In addition, after a thorough review of the exhibits, I make the following findings of fact.

The individual first used marijuana in 1997 while in high school at the age of sixteen. Ex. 8 at 11-12. Although he realized marijuana was illegal, the individual maintained that he used it because of "curiosity" and "peer pressure." *Id.* at 12. During his time in high school, the individual used marijuana approximately ten times. He stated that his usage was not an "everyday thing" but occurred "just once in a while." *Id.* at 12-13. The individual only used marijuana at parties with friends and recalled that the marijuana made him drowsy, tired and hungry. *Id.* at 14. He last recalled using marijuana during his senior year of high school in 1998. *Id.* The individual stated that he stopped using marijuana prior to entering the military because he didn't want anything to negatively affect his future. *Id.* at 15.

In 2003, while in the military, the individual experimented with cocaine on one occasion. *Id.* at 19. The circumstances surrounding that usage are as follows. A friend offered the individual cocaine at a party. *Id.* The individual claims that he thought that his friend was playing a joke with baking powder or baking soda. *Id.* at 21. The individual recalled questioning his friend about the nature of the substance to which his friend replied, "it's just a little bit of cocaine" and "you can taste it." *Id.* Because he believed his friend to be joking, he dipped his finger in the powder and tasted it. *Id.* at 20-21. The individual stated that his use was a "one-time thing" that had no affect on him. *Id.* at 20-22. He admitted that although he realized cocaine was illegal, he used it because of "curiosity" and to see how it tasted. *Id.* at 19. He stated that he was never convinced that the substance was cocaine and not baking powder, but believed it to be cocaine because of what his friend told him. *Id.* at 21-22.

The individual admitted that this one-time experimentation with cocaine while in the military constituted illegal drug use. *Id.* at 19. He noted, however, that at the time he used cocaine, he was on military leave and being processed out of the military. *Id.* at 24. The individual stated that prior to his first deployment, he remembered filling out a "big stack" of paperwork for which he was told was for a clearance. *Id.* at 24. However, he was not sure if he held a clearance at the time of the cocaine use. *Id.* He maintained that he was not given any information regarding the type or duration of this clearance. *Id.*

IV. Regulatory Standard and the Individual's Burden

The applicable regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). There is a strong presumption against the granting or restoring of a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for the granting of security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting him an access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

V. Hearing Testimony

1. The DOE Personnel Security Specialist

The DOE Personnel Security Specialist (security specialist) testified that the individual’s application came to the attention of personnel security because of concerns uncovered during his background investigation. Tr. at 13. Specifically, the individual admitted illegal drug involvement and usage in 1997 and 1998, when he used marijuana approximately ten times and also when he experimented with cocaine in May 2003. *Id.* at 13.

The security specialist further testified that at the time of the 2007 PSI, all mitigating, derogatory or disqualifying factors were considered and there were not enough mitigating factors to resolve the concerns. *Id.* at 16. The security specialist explained that during his PSI, the individual admitted to holding a DOD clearance while using cocaine. *Id.* The security specialist testified that DOE has concerns about the individual’s trustworthiness because he knowingly violated the rules and regulations he pledged to abide by when he was granted a security clearance. *Id.* at 17.

With regard to the individual’s marijuana use in 1998 and 1999, the security specialist stated that the only mitigating factor would be time because the individual’s usage occurred approximately nine to ten years prior to the PSI. *Id.* at 20. However, the security specialist maintained that the individual’s earlier marijuana use coupled with his cocaine use in 2003 indicate a greater likelihood of recurring drug use. *Id.* at 18. The security specialist further testified that this recurrence of illegal drug use also indicates a possible pattern of illegal drug activity and association with persons who use drugs. *Id.* at 21.

2. The Individual’s Wife

The individual's wife testified that she met the individual approximately six years ago through a mutual friend. *Id.* at 25-26. She stated that she and the individual dated for four years and have been married for almost two years. *Id.* She testified that she first became aware that the individual had used drugs when he completed his paperwork for the access authorization. *Id.* at 27. She stated that she was surprised because she has never known the individual to use drugs. *Id.*

The individual's wife testified that the individual no longer associates with the military friends who were at the party when he experimented with cocaine in 2003. *Id.* at 30. She testified that she is confident that the individual will never use drugs again. *Id.* at 31. She continued that if the individual used drugs, it would be the end of "everything" and that the individual would "never place that in jeopardy." *Id.*

The individual's wife testified that although she knew the individual during the time of his illegal drug use in May 2003, they were living apart and dating. *Id.* at 32. She stated that the individual's drug use was not intentional and that he believed it to be a joke. *Id.* She stated that since they have been married, they don't socialize with anyone except family nor does the individual associate with anyone who is involved with drugs. *Id.* at 33.

3. The Individual

The individual testified that he last smoked marijuana at the ages of 16 and 17 in 1998 and 1999, ten years prior to the hearing in this case. *Id.* at 36. He maintained that he has no idea where his high school acquaintances currently live and last recalled having contact with anyone from high school when he went home on Christmas leave in 2000. *Id.* at 36-37. He testified that he purposely stopped using marijuana in 1999 because he knew that drug use could impact his military career. *Id.* at 37. He stated that he knew using marijuana was a bad thing and that it was against the law. *Id.* He testified that he did not use any illegal drugs between 1998 and 2003. *Id.*

With regard to his cocaine use in 2003, the individual testified that his one-time experimentation with cocaine occurred with a military friend whom he had known for three years. *Id.* at 40. He stated that he and his friend were at a party with the rest of their military unit. *Id.* at 41. The individual testified that while at the party, he saw powder in a room on a corner of a table. *Id.* at 52. After he saw it he asked "what the heck is that?" *Id.* The individual stated that he was "freaked out a little bit" because he had never seen cocaine before. *Id.* His friend told him that it was cocaine and because he thought his friend was joking, he put his finger in the cocaine and tasted it.⁴ *Id.* at 52; 54.

The individual stated that he had never seen nor used cocaine prior to that incident. *Id.* He also testified that he had never known his friend to use drugs prior to the May 2003 incident. *Id.* at 40. The individual maintained that he could not identify cocaine by taste, but believed the substance to be cocaine after his friend told him that it was. *Id.* at 54. He stated that at the time he used the cocaine he was not thinking about doing something illegal, but that it dawned on him shortly

⁴The individual maintains that he believed his friends were joking with him because the guys on his unit "weren't quite right" and that "they were always doing stupid stuff." Tr. at 53.

thereafter that what he did was wrong. *Id.* at 57. He stated that after he tasted the cocaine, he left the area and did not touch it again. *Id.* at 59. He also admitted that at the time of his cocaine use, he had had his “fair share to drink” and was “legally probably over the limit.” *Id.* at 58. He stated that he was not “falling down drunk” but believes that the alcohol may have had some impact on his judgment. *Id.*

The individual characterized his cocaine use as an “experiment” and not “use.” *Id.* at 38. He explained that he listed cocaine on his QNSP as drug use because he understood the question as asking if he previously had any contact with any illegal drug. *Id.* at 38-39. He stated that he wanted to be as forthright and honest as possible. *Id.* at 39.

The individual explained that he experimented with the cocaine while on “terminal leave” which meant that he was technically active in the military but not in a unit and not obligated to report to any type of duty.⁵ *Id.* at 42. The individual stated that he did not consider himself in the military at the time of his experimentation with cocaine because he was not in an operations unit and was “hanging around” waiting to return home. *Id.* at 43-44. He did, however, later admit that at the time of his experimentation with cocaine, he was still “technically in the military” and “technically under contract,” and therefore knew that he violated military policy. *Id.* at 44.

However, with regard to the individual’s DOD clearance, the individual maintained that at the time of his experimentation with cocaine, he was unsure if he held a security clearance. *Id.* at 49. The individual testified that the intelligence office that handles the clearances for military personnel conducted numerous searches of different files and computer resources and could not locate a clearance on record for the individual. *Id.* at 45-46.

The individual testified that currently he does not know or associate with anyone that uses drugs. *Id.* at 60. He stated that he and his wife relocated to a new city two years ago. *Id.* at 60-61. The individual testified that they do not have any friends that they hang out with socially but that he does have family in the area. *Id.* The individual stated that he is now very selective of whom he associates with. *Id.* at 61.

The individual testified that if he were granted a clearance, he would not risk everything that he has worked for including his marriage, his house, or his job, by letting “curiosity” get the best of him. *Id.* at 62-63. He testified that he has had a “real eye opener” since he fought in Iraq in February 2004 and February 2005, and that war “humbles you and makes you realize what’s important.” *Id.* at 63. The individual testified that at the time he experimented with cocaine in 2003, he was 22 years old and that he is currently 27 years old. *Id.* at 64. He testified that his circumstances have changed because of what he and his wife have gone through, such as the experiences surrounding his deployment to war zone, getting married, and relocating and buying a house. *Id.* at 65.

The individual testified that he has submitted to numerous random drug screenings, with his most recent screening occurring three days prior to the hearing. *Id.* at 67-68. He testified that the result of that test and previous tests have always been negative. *Id.*

⁵ The individual further explained that a person could save up all of his or her leave from the entire year and be discharged from military service sooner. Tr. at 42.

4. The Individual's Additional Documentary Evidence

In addition to the information referred to above, the individual submitted a letter on his own behalf and letters from his mother, his wife, and former supervisor. All of them state that the individual is an honest, dependable and responsible person. Each of them, except the letter from his former supervisor, address the cocaine usage and discuss how the individual took responsibility from it and has learned from his mistakes. Ind. Ex. A-D.

VI. Analysis

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors.

After due deliberation, I have determined that the individual's access authorization should be granted. I find that granting the individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

1. Criterion K

With regard to the individual's drug use, the record reflects two concerns: (1) the individual's marijuana usage while in high school; and (2) the individual's one-time cocaine use while in the military. Each concern is addressed below.

a. Marijuana

Based on my review of the record and all of the applicable factors and mitigating conditions, I find that the individual has mitigated the concern with respect to his marijuana use.⁶ The individual's usage is mitigated by time because it occurred over 10 years ago while he was 16 and 17 years of age and a high school student. Tr. at 36. Further, the individual self-reported this drug use in his

⁶ In this instance, I specifically consider Guideline H of the Revised Adjudicative Guidelines mitigating conditions 26(a): the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) an appropriate period of abstinence. The remaining mitigating conditions have no application to the facts of this case.

PSI and QNSP. Ex. 8 at 9-10; Ex. at 7 at 33-34 of 38. I also conclude that the individual was sincere when he testified that he has not used marijuana since 1998 and does not intend to use marijuana in the future. Ex. 8 at 14; 18. Additionally, he demonstrates his intent to no longer abuse drugs by avoiding those childhood acquaintances that he used the marijuana with or anyone who uses illegal drugs. Tr. at 33; 36-37; 60-61. Moreover, he demonstrates maturity by his recent marriage, relocation and purchase of a new home. *Id.* at 65. Lastly, the individual has never tested positive for marijuana use. *Id.* at 67-68.

b. Cocaine

After careful review of the record in this case, I find for the following reasons that the individual has mitigated the Criterion K concern with regard to his one-time experimentation with cocaine. First, the individual has physically separated himself from his military acquaintances that used drugs. *Id.* at 33; 60-61. Second, a significant period of time, five years, has passed since his one-time cocaine use. *Id.* at 59. Further, there is no information indicating that the individual has used illegal drugs since 2003. The individual testified that the cocaine had no effect on him and that he does not desire to use cocaine in the future. *Id.* at 56. In retrospect, the individual now recognizes that his decision to use cocaine was a bad decision that has negatively affected his life and his career. *Id.* at 68-70. He has further matured since his cocaine use for the reasons stated above. *Id.* at 65.

For the foregoing reasons, I believe that the risk that the individual will again use illegal drugs is low. Consequently, I find that the individual has resolved the Criterion K security concern.

2. Criterion L

The Criterion L concern centers on the individual's admitted drug use while in high school and while on military leave and in possession of a DOD security clearance. Additionally cited as Criterion L derogatory information was the fact that the individual used cocaine even though he was aware of the military's zero tolerance policy regarding illegal drugs.

These undisputed facts clearly raise concerns about the individual's reliability. On one hand, the individual engaged in unusual conduct involving drugs. While in high school and guided by "curiosity" and "peer pressure," the individual used marijuana approximately ten times between 1997 and 1998. *Id.* at 12. He then made a conscious decision to stop using marijuana because he knew that further use would negatively impact his military career. *Id.* at 15. However, despite his resolve to stop using illegal drugs, he was once again guided by "curiosity," and while still in the military he made another conscious decision to "taste" cocaine even though he was "technically on military duty" and apparently in possession of a DOD security clearance. *Id.* at 19.

On the other hand, there are also mitigating factors that must be considered.⁷ The individual's one-time experimentation with cocaine happened over five years ago when the individual was 22 years

⁷ Mitigating Condition 17(c) states that an individual can mitigate a security concern with regard to personal conduct where the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment. See Guideline E of the *Revised Adjudicative Guidelines*.

old. The individual's marijuana usage happened over ten years ago while the individual was in high school. In my opinion, the individual's decisions to use marijuana and cocaine can be attributed to his youth and immaturity at the time he illegally used those drugs. Also, the individual was honest with DOE in discussing his prior marijuana use and one-time cocaine use and voluntarily reported this information. *See Personnel Security Hearing*, 29 DOE ¶ 82,755 (July 27, 2004) (Case No. TSO-0079) (security concern mitigated by self-report); *Personnel Security Hearing*, 28 DOE ¶ 82,963 (March 25, 2004) (Case No. TSO-0068) (security concern mitigated by self-report); *Personnel Security Hearing*, 27 DOE ¶ 82,835 (Feb. 25, 2000) (Case No. VSO-0313) (security concern mitigated by self-report) (*aff'd* OSA, April 20, 2000).

Further, I again note that the individual has demonstrated his maturity through significant changes in his life style, including getting married, relocating to a new area and buying a home. The individual has also served two tours of duty in a war zone and testified that he and his wife have bonded because they went through this war-time experience together. Tr. at 63; 65. Thus, the individual has experienced life style changes that indicate he has matured in his decision making beyond his ability at the ages of 16 and 22.

Finally, there appears to be inconsistent statements in the record regarding whether the individual possessed a DOD security clearance at the time of his experimentation with cocaine. Even if the individual possessed a DOD security clearance and was admittedly aware of the military's zero tolerance policy, I find that he has presented compelling evidence to demonstrate, as noted above, that he has matured considerably since he used cocaine while in the military. *See* Mitigating Condition 17(d) of the *Revised Adjudicative Guidelines*. Moreover, the individual was a credible witness who was very honest and straightforward about his past behavior, and remorseful of the conduct that led DOE to question his judgment and honesty. Finally, I find that the individual is not subject to pressure, coercion, exploitation or duress because he has informed his wife and family members of his use and voluntarily reported this information to DOE. *See id.*, Mitigating Condition 17(e). Thus, I am convinced that the Criterion L security concern with regard to this issue has been mitigated.

In summary, the individual's marijuana use is mitigated by the passage of time. *See id.*, Mitigating Condition 26(a). Additionally, the individual's one-time use of alleged cocaine occurred under such isolated circumstances that it is unlikely to recur.⁸ *See id.* Because the individual's use of marijuana and one-time use of cocaine led to the Criterion L concern and he is no longer using either substance, I do not have reason to question the individual's reliability, trustworthiness, good judgment or ability to protect classified information. *See id.* Consequently, I find that the security concern under Criterion L has been resolved.

VII. Conclusion

In view of Criteria K and L and the record before me, I find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with

⁸ The individual was not sure that the powdery substance he "tasted" was cocaine. *See* Ex. 8 at 21-22; Tr. at 54. There is no evidence in record that he saw anyone else ingesting the powder or that the powder had any effect on other guests at the party.

the national interest. Accordingly, I find that the individual's access authorization should be granted. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Avery R. Webster
Hearing Officer
Office of Hearings and Appeals

Date: September 2, 2008

